Catholic Healthcare West Southern California d/b/a Marian Medical Center *and* Caregivers and Healthcare Employees Union (CHEU), Petitioner and Healthcare Employees Union Local 399, SEIU, AFL–CIO, Intervenor. Case 31–RC–8045

May 30, 2003

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held November 13 and 14, 2001, and the hearing officer's report recommending disposition of them.[1] The tally of ballots shows 172 for Petitioner Caregivers and Healthcare Employees Union (CHEU), 10 for Intervenor Healthcare Employees Union Local 399, SEIU (SEIU), and 150 votes against the participating labor organizations, with 36 challenged ballots, a determinative number. In addition, the Board has considered certain objections and exceptions filed by the Employer and the Intervenor.

The Board has reviewed the record in light of the exceptions and briefs, and adopts the hearing officer's findings and recommendations, except for: (a) his recommended disposition of Ruby Sagisi's challenged ballot and a related election objection;[2] and (b) his finding and recommendation regarding the voting eligibility of maintenance engineer Florencio Montoya.[3]

Montoya's regular place of duty was at the Employer's Marian West satellite facility. The hearing officer found that Montoya was temporarily and indefinitely assigned to work at the Employer's main facility at 1400 Church Street, the location specified in the unit description, during the payroll eligibility period and on the date of the election. Accordingly, the hearing officer found that Montoya was an eligible voter and recommended that the challenge to his ballot be overruled. The Employer contends that Montoya was a temporary employee and, as such, was ineligible to vote. We find merit in the Employer's exception.

Legal Standard

As a general rule, an employee who is employed and working in the unit on the payroll eligibility date and the date of the election is eligible to vote. The rule is not a rigid one, and there are exceptions. *NLRB v. New Eng-*

[1] Included in the unit are: All full time and regular part-time technical employees, skilled maintenance employees, and other nonprofessional employees employed by the Employer at its facility at 1400 East Church Street in Santa Maria, California, including employees in the following job classifications: Biomed tech; maintenance engineer; cardiovascular tech; cath lab tech; licensed vocational nurse (LVN); nuclear medical tech; radiology tech i, ii, and iii; respiratory tech; surgical tech (also called OR tech); and ultrasound tech; EEG tech; van driver (in admitting); clerk/typist (except in medical records and patient accounting); certified nursing assistant (CNA); cook; courier; central supply aide, central supply tech; dietary clerk, dietary aide, dietary tech; EKG tech; emergency room tech; food service workers I, II, and III; GI tech; housekeeper; instrument tech; lab assistant I, II, III, and IV; lab tech; linen folder; monitor observer/monitor tech; unit clerk/nursing assistant/monitor observer (UC/NA/MO); nurses aid; obstetrics tech (OB tech); operating room aide; operating room scheduler; unit clerk/scheduler; pharmacy courier; pharmacy clerk; printer; project housekeeper; physical therapy aide; buyer; scrub tech/unit clerk; storeroom clerk; tissue tech/pathology assistant; unit clerk; materials distribution clerk; materials distribution aide; clerk (departments); admitting clerk (except discharge counselor and insurance verifier); assistant buyer; transporter; senior nurses aide; unit clerk/EKG tech; front desk receptionist and pharmacy tech. Excluded from the unit are: All other employees, business office clericals, employee health employees, information systems employees, professional employees, guards, confidential employees, managerial employees, and supervisors as defined in the Act.

[2] The Employer filed several objections to the conduct of the election, one of which was founded on the failure of Ruby Sagisi, a challenged voter, to place her ballot in a challenge envelope before depositing it in the ballot box. Thus, Sagisi's ballot was commingled with the other ballots and could not be identified as a challenged ballot. Because the challenged ballots in this matter were potentially determinative, the hearing officer proposed alternative methods for addressing Sagisi's ballot and voting eligibility and resolving the result of the election. The Board finds that only 10 of the 36 challenged ballots are valid and should be counted. Thus, it is clear that the valid challenged ballots, when added to the revised tally of ballots, cannot affect the result of the election, regardless of Sagisi's vote. Accordingly, we need not further address the status of her ballot or the Employer's objection to its having been commingled with the other ballots.

[3] We adopt pro forma the following recommendations of the hearing officer, to which there were no exceptions: to overrule challenges to the ballots of Smith and Malone on the basis of their alleged supervisory status; to overrule a challenge to the ballot of Ramos based on an inadvertent error, timely corrected, checking her name on the *Excelsior* list when another employee named Ramos voted; to overrule Employer Objection 22, regarding an error, timely corrected, in logging in a challenged ballot; to overrule Intervenor Objection 1, alleging discriminatory access rules; to overrule Intervenor Objection 2, alleging surveillance; to overrule Intervenor Objections 4 and 5, alleging the unlawful announcement and grant of a wage increase; and to overrule Intervenor Objection 6, alleging unspecified other unlawful conduct.

We adopt the following recommendations by the hearing officer, as we find no merit in the exceptions: (1) The recommendation to overrule the challenge to Lafaive's ballot based on her employment location. Chairman Battista concurs in this result but expresses concern as to whether the standard set forth in *Davison-Paxon Co.*, 185 NLRB 21 (1970), should be applied to employees who are also employed by the same employer in nonbargaining unit positions or locations. (2) The recommendation to sustain challenges to the ballots of 11 transcriptionists, a classification not expressly addressed in the unit description, on the basis that the transcriptionists have a community of interest with the business office clerical employees, who are expressly excluded from the unit.

land Lithographic Co., 589 F.2d 29 (1st Cir. 1978). The Board considered one such exception, relevant here, in *Pen Mar Packaging Corp.*, 261 NLRB 874 (1971). There, the Board applied its well-established test for determining the voting eligibility of an employee classified as temporary:

> It is established Board policy that a temporary employee is ineligible to be included in the bargaining unit [footnote omitted] and that an employee's eligibility status is determined by his status as of the eligibility payroll date. [Footnote omitted.]

The critical inquiry is whether the employee's tenure of employment remains uncertain. Only then would the employee be eligible to vote. *NLRB v. New England Lithographic*, supra, relying on *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433 (1958), and *Personal Products Corp.*, 114 NLRB 959 (1955). Accord: *NLRB v. S.R.D.C., Inc.*, 45 F.3d 328 (9th Cir. 1995; *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419 (2d Cir. 1996).

At issue in *Pen Mar* was the eligibility of a temporary employee who had been hired to work only during the summer months, without expectancy of permanent employment. The employee was retained for a short time beyond the intended summer period when the work he was hired to perform lasted longer than originally anticipated. Thus, the employee remained temporarily in the employer's service during a period encompassing the voting eligibility period. The Board found that the employee remained, at all times, a temporary employee, and that his prospect of termination at summer's end was sufficiently finite to dispel reasonable contemplation of continued employment thereafter. Accordingly, the Board found that the employee did not share a community of interest with the unit employees and, thus, was ineligible to vote, notwithstanding the limited extension of his temporary, finite work assignment.

Subsequently, in *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992), the Board considered the voting eligibility of a student hired pursuant to the employer's established work-study program to work on a filing project with the unit employees for a term limited to 1 year, beginning in November 1990. It was anticipated, pursuant to the work-study program, that the student would depart in September 1991 for college study. In August 1991, however, the student informed the employer she would not be going to college and sought permanent employment. The employer did not hire her for a permanent position, but retained her as a temporary employee "until the filing backlog was completed," a task estimated to require 3–4 months, but which ultimately took more than 6 months. The student subsequently cast a challenged ballot in the union election. A week later, the employer announced that the employee's temporary job would end in 15 days, because the filing project for which she had been employed was completed. The Board found the student ineligible to vote. Relying on *Pen Mar*, the Board, at 309 NLRB at 713, explained that the test for voting eligibility

> does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.

Because it was clear that the employer retained the student as a temporary employee to complete a specific filing backlog project of several months duration, the Board found that the filing job's ultimate completion was an ascertainably certain event sufficient to preclude the student's voting eligibility.

The Board has focused, in these and similar cases, on the critical nexus between an employee's temporary tenure and the determination whether he shares a community of interest with the unit employees sufficient to qualify as an eligible voter. That is, in determining whether an employee classified as temporary is eligible to vote, the Board examines whether or not the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created. *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1979) (students hired for one summer without expectancy of continued employment); *Kaiser Cement & Gypsum*, 158 NLRB 1740, 1744 (1966) (employees included in one unit who were temporarily transferred to work at location of a separate unit); *FWD Corp.*, 138 NLRB 386, 390 (1962) (employee on 6-month temporary training assignment to unit location); and *Irwin & Lyons Contractors*, 51 NLRB 1370, 1373 (1943) (employees transferred from one logging camp to another during temporary shutdown). As a general rule, a temporary employee hired for a finite, ascertainable term likely will not have a community of interest with unit employees sufficient to qualify him to vote. A temporary employee hired for an indeterminate term, who is working during the voting eligibility period, is generally more likely to be a qualified voter.[4]

[4] As shown, in the context of the voting eligibility of a temporary employee, whose community of interest with the unit employees is uncertain, the Board inquires whether the termination of the temporary employment is "sufficiently finite . . . to dispel *reasonable contemplation of [the employee's] continued employment* beyond the term for

Montoya's Challenged Ballot

Applying these principles to the instant case, we find that Montoya's assignment to work at the Employer's main facility was at all times a temporary assignment, the duration and end of which was tied to specific conditions and events and, thus, was sufficiently ascertainable to render him ineligible to vote in the election.

It is undisputed that Montoya, a part-time maintenance worker, was permanently and regularly employed on the weekend shift at the Employer's Marian West facility, a location not included in the unit description. Thus, he ordinarily would not have been an eligible voter. However, in May 2001, 5 months before the October payroll eligibility date for the election, the Employer transferred Montoya to its main campus, the location covered by the unit description, where he was working during the payroll eligibility period. The testimony of Operations Manager Dennis Daniel shows that the Employer intended to continue Montoya's assignment to the main campus facility only until the Employer hired a replacement for Montoya at the main campus facility, that the Employer intended to hire the replacement as soon as renovations at the Marian West facility were completed, and that the Employer intended to transfer Montoya back to the Marian West facility at that time. In short, the evidence shows that Montoya was assigned to the main campus facility for a finite, ascertainable term—that is, the duration of the Marian West facility renovation. Indeed, the evidence shows that the Employer transferred Montoya back to Marian West as planned. Further, we note that the Employer did not change the accounting cost center on Montoya's payroll account from Marian West to the main facility during Montoya's temporary assignment, a fact that further supports the Employer's assertion that it always intended to transfer Montoya back to Marian West.

There is a conflict in the evidence regarding whether the Employer informed Montoya that the transfer was temporary. Montoya testified that he was not so informed. Daniel testified that he told Montoya that the transfer was temporary, without giving him a specific time frame. The hearing officer did not resolve this conflict, and we need not do so.[5]

For the reasons we have discussed, we find that, as of the voting eligibility period and on the date of the election, the term of Montoya's temporary assignment was both finite and reasonably ascertainable. It was clear that his assignment at the main facility would end with the Employment of his replacement, in conjunction with the completion of renovations and reopening of the Marian West facility. Therefore, we find that Montoya did not share a community of interest with the unit employees and was not eligible to vote.[6]

DIRECTION[7]

IT IS DIRECTED that Employer Objections 21 and 22, and Intervenor Objections 1, 2, 3, 4, 5, and 6 are overruled.

IT IS FURTHER DIRECTED that the challenges to the ballots cast by Lindsay Brown, James Caldwell, Teresa Garza, Ray Becerra, Teresa Souza, Davina Lloyd, Angelita San Gabriel, Rose Dakeen, Linda Brock, Ellen Palmer, Christine McCann, Margaret Scharf, Cleora Dornan, Karla Smith, Rebecca Warden, Melinda Verroco, Anita Flores, and Florencio Montoya are sustained.

IT IS FURTHER DIRECTED that challenges to the ballots cast by Sally Casarez, Karen Foley, Debra Smith, Tim Malone, Imelda Ramos, and Lisa LaFaive are overruled, and that the Regional Director shall, within 10 days from the date of this Decision, Direction, and Order, at the

which he was hired." (Emphasis added.) *St. Thomas-St. John Cable TV*, supra. As the cited cases illustrate, this inquiry is to be distinguished from the Board's standard for determining the voting eligibility of an employee who otherwise would have been working in the unit on the voting eligibility dates but did not work due to temporary layoff. In such cases, the absent employee has established a community of interest with the unit employees by virtue of his history of employment in the unit. Accordingly, the Board need only determine whether the employee has a reasonable expectation of returning to work and continuing his employment in the unit once the condition or contingency causing the absence has ended.

[5] The question, as explained in *Pen Mar* and *St. Thomas-St. John Cable TV*, is whether the prospect of the end of Montoya's assignment to the main facility was sufficiently finite and ascertainable, on the payroll eligibility date, to dispel reasonable contemplation of his continued employment at the Employer's main facility. The answer to this question does not necessarily turn on resolution of the conflict in testimony regarding what explanation, if any, the Employer gave to Montoya when it temporarily assigned him to the main facility. We do not hold that such evidence could never be a relevant or dispositive factor in determining whether an assignment is temporary. We hold only that here it is not.

[6] Compare *Ameritech Communications, Inc.*, 297 NLRB 654 (1990) (temporary employees eligible to vote where they were hired for an indefinite period without a specific ending date or relation to a specific work assignment or contingency, and the employer transferred them between jobs as one job was completed and another undertaken). Here, in contrast, it is clear that the Employer intended, from the outset, to terminate Montoya's temporary assignment and return him to his regular job after it filled the vacancy at the main facility, and on the completion of renovations and reopening of the Marian West facility.

[7] Prior to the hearing, the parties agreed to sustain the challenges to the ballots of Maria G. Perez, Melissa Jones, Alicia Renfro, Elsa Sandoval, Elizabeth Nan-Bowman, May Fulton, Kami Tipay, and Florinda Sjostedt. The parties also agreed to open and count the challenged ballots cast by Stella Lopez, Annmarie Scheve, Judy Fauria, and Keenan Rodarte. The Regional Director shall include the ballots of the latter four employees in the final tally of ballots, if this has not already been accomplished.

time, date, and place to be announced, open and count their ballots and prepare and serve on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

ORDER

IT IS ORDERED that the proceeding is remanded to the Regional Director for Region 31 for further processing consistent herewith.